No. 16427

IN THE

United States
Court of Appeals
For the Ninth Circuit

CHESTER THOMAS VANDABLE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Arizona adjudging Appellant to be guilty of an indictment charging defendant with a violation of Section 1708 of Title 18, United States Code, theft of mail.

The jurisdiction of the District Court was based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question under provisions of Sections 1291 and 1294 of Title 28, United States Code.

STATEMENT OF THE CASE

Appellee would like to supplement Appellant's statement of the case with the following resume' of the facts of the case.

The prosecution grew out of an investigation conducted by Edwin S. Samppala, Postal Inspector, United States Post Office Department, as to the theft of the mails in the City of Globe area of the State of Arizona, particularly the taking of mail from the rural box of Mrs. LeRoy Tucker, on the U. S. Payson Star Route, Globe Arizona. Appellant gave a signed confession admitting the theft from the mails.

An indictment was returned by the Grand Jury on April 8, 1958 charging the Appellant herein with the theft of the mail in question. At the time the indictment was returned by the Grand Jury and filed, the Appellant was in the custody of the Gila County Sheriff for violation of a criminal statute of the State of Arizona. Appellant admitted the theft to the Gila County Sheriff enroute to Arizona. A retainer or hold was placed on the Appellant by the United States Marshal pending the final disposition of the Appellant by the State of Arizona. On or about November 1, 1958 the Appellant was released into the custody of the United States Marshal and on November 7, 1958 he was brought before the United States District Court for the District of Arizona for arraignment and pleaded not guilty. Appellant's trial was set for December 9, 1958 and on that date the trial was held before a jury and Appellant was found guilty as charged.

The United States District Judge for the District of Arizona, James A. Walsh, attempted to appoint counsel to represent Appellant after Appellant discharged his own attorney. Page 3, lines 1-3, December 1, 1958 Proceedings. Appellant refused council and advised the Court that it was his desire to conduct his own

defense and he did conduct his own defense on December 9, 1958.

On December 22, 1958, the Honorable James A. Walsh sentenced the Appellant to the custody of the Attorney General or his authorized representative for a period of four years.

ARGUMENT

Throughout this section of the brief we will attempt to answer the arguments as raised in Appellant's Brief under their section "Argument " and will refer to the different points raised under similar numbers and headings with reference to page numbers in the Appellant's Brief as well as to pages in the printed transcript. If reference is to pages in Appellant's Brief it will be so stated.

Appellant was not denied his right to a speedy trial. While incarcerated by the authorities of the State of Arizona, Appellant never made a demand to the District Court for a trial and therefore he is not in a position now to claim that his rights were violated. The Appellant's incarceration by the State of Arizona was a circumstance beyond the control of the Appellee and satisfactorily explains the alleged delay assigned as error by the Appellant.

Appellant has the right to be represented by counsel but this right can be waived and in the present case Appellant intelligently waived his right to be represented by counsel. Appellant chose to assert his right to represent himself and the Court was without power to force an attorney upon the Appelant against his wishes. Having chosen to represent himself Appellant did not have the right to have the trial judge act as his counsel.

The denial of Appellant's Motion for a New Trial rested in the sound discretion of the trial judge and should not be disturbed.

There is no showing of an abuse of discretion on the part of the trial court.

I.

DID THE TRIAL COURT ERR IN FAILING TO DISMISS THE CAUSE ON THE GROUNDS AND FOR THE REASONS THAT THE DEFENDANT WAS DENIED A SPEEDY AND IMPARTIAL TRIAL AS GUARANTEED UNDER THE UNITED STATES CONSTITUTION? App. Br. p. 14.

Appellee contends that Appellant was given a speedy and impartial trial as guaranteed to him under the United States Constitution.

A look at the case cited by Appellant, Shepard v. U.S., 163 Fed. 2d 974, 8th Cir., clearly shows what is meant by a speedy trial and also what steps a defendant must take in order to claim later that he was denied a speedy trial. At page 976 of that opinion the Court said:

> "A speedy trial, generally speaking is one conducted According to prevailing rules, regulations and proceedings of law, free from arbitary, vexatious and oppresive delays. The right does not require a trial immediately upon the return of an indictment, nor an arrest made under it, but it does require that the trial shall be had as soon as reasonably possible, after the indictment is found, without depriving the prosecution of a reasonable time in which to prepare for trial. Delays which have been caused by the accused himself cannot, of course be complained of by him. The right of the accused to a discharge for failure of the prosecution to give him a speedy trial is a personal one to him and may be waived. *He must assert the right if he wishes its protection*

> *and if he does not make a demand for trial* or resist a continuance of the case, or if he goes to trial without objection that the time limit has passed, or *fails to make some kind of effort to secure a speedy trial, he will not ordinarily be in a position to demand dismissal because of delay in prosecution,—"*

The record shows that Appellant was taken into custody by the United States Marshal on November 1, 1958; arraigned on November 7, 1958 and tried by the Court and Jury on December 9, 1958. It is obvious he was not denied a speedy trial.

Appellant contends that he was held from February to December before he was tried. The record shows (Testimony of Jack Jones, Sheriff, Transcript of Proceedings December 9, 1958, page 22, lines 11-25, and page 29 at lines 5-11), that Appellant was being held by and for the State of Arizona for violation of one of their own criminal statutes and was not available to Appellee for prosecution until November 1, 1958.

> "Except for some rule of comity recognized by statute when one system of courts takes jurisdiction of a thing or person that thing or person is withdrawn from the judicial power of the other."
>
> Nolan vs. U.S., 163 F. 2d 768, 8 Cir.

The Court in the Shepard case, supra, commenting on a delay for prosecution, said at page 978, note (9, 10).

> "The right of a speedy trial is relative. It is not inconsistent with delays but depends upon circumstances and here the delay is satisfactorily explained by the government."

APPELLEE contends that the long delay asserted by Appellant

has been satisfactorily explained.

The record further shows (Transcript of Proceedings December 9, 1958, page 43, line 5-14), that Appellant, while in the custody of the State of Arizona, did not make a demand to the District Court for a trial, even though during that time he was represented by council of his own choice. The Court, in Pietch v. U.S., 110 Fed. 2d 817, page 819, said:

> "A person charged with a crime cannot assert with success that his right to a speedy trial guaranteed by the 6th amendment to the Constitution of the United States has been invaded *unless he asked for a trial. In the absence of an affirmative request or demand for trial made to the Court it must be presumed that Appellant acquiesced in the delay and therefore cannot complain.*"

II.

DID THE TRIAL COURT ERR IN FAILING TO ADVISE APPELLANT THAT HE COULD HAVE TAKEN THE STAND IN HIS OWN BEHALF EVEN THOUGH APPELLANT WAS ACTING AS HIS OWN ATTORNEY? App. Br. p. 16.

It is well settled that an accused in a criminal case has the right to counsel. It is equally true that an accused has the corresponding right to represent himself.

"The Court does not force a lawyer upon a defendant."

Adams v. U.S. ex rel. McCann
37 U.S. 269, 63 Sup. Ct. 336
87 L. Ed. 268, 143 A.L.R. 435

"The right to assistance by counsel can be waived by an individual defendant if he knows what he is doing and his choice is made with eyes wide open."

Johnson v. Zerbst, 304 U.S. 458 (468-69)

The trial Court cautioned Appellant about the pitfalls of acting as his own attorney. (Transcript of Proceedings December 1, 1958, page 3, lines 5-21). Appellant waived his right to counsel and decided to represent himself in spite of the Court's warning and now assigns error on the very point he was cautioned about.

In the case of Burstein v. U.S., 178 Fed. 2d 665, 9th Cir. the Court clearly pointed out at page 670:

> "When Appellant chose to proceed without counsel, he chose a course of action fraught with the danger that he would commit legal blunders. But having made that choice he did not thereby acquire the right to have the Court act as his counsel whenever he seemed to be blundering. It cannot be said that the Court denied him representation of counsel, or denied him a fair trial because the Judge refrained from intermeddling."

Appellant waived his right to be represented by counsel and chose to represent himself, which he had the right to do. Having done so, Appellant did not have the right to have the Trial Judge act as his counsel.

III.

Appellant's Argument raised in Question A(4) on pages 20, 21, 22 of his brief is without merit, and contrary to the record. The Court did give an instruction to the jury covering the admissibility of confessions and therefore no error was made. (Transcript of Proceedings December 9, 1958, page 57, line 12-22).

IV.

Appellant's Argument raised in Question A(5) on pages 22, 23, 24 of his brief is without merit, and contrary to the record.

The Court did instruct the jury that Appellant had the right to represent himself. (Transcript of Proceedings, December 9, 1958, page 63, line 2).

V.

Did the Trial Court err in denying Defendant's Motion For a New Trial on the grounds set forth in his Motion for a New Trial?

The granting of a new trial is a matter resting in the sound discretion of the Trial Court which may not be disturbed in absence of abuse.

Patterson v. U.S., 183 F. 2d 327, 4th Cir.

Newman v. U.S., 238 F. 2d 861, 5th Cir.

Apodaca v. U.S., 190 F. 2d 687, 2nd Cir.

Weight should be given to the decision of the presiding judge in denying motion for a new trial, since he saw witnesses and heard them testify. The presiding judge was present when the Appellant conducted his defense and weight should be given to his decision that Appellant was given a fair and impartial trial. The presiding judge took into consideration Appellant's inexperience in Courtroom procedure and in his sound discretion rightfully denied Appellant's motion for a new trial and his reasons for so doing appear in the Record.

> "THE COURT: I tried to tell you when we were determining whether we would have counsel appointed or to represent yourself that you would have difficulty. I pointed out to you some misunderstanding that you already had as to the law."

Transcript of Proceedings, December 1, 1958 at page 7A, line 22.

> "THE COURT: On the matter of the driver's license, of course, that was not controverted; it was a question for the

jury and the jury decided."

Transcript of Proceedings, December 1, 1958 at page 8, lines 22, 23, 24.

A look at the record will show that Appellant was well represented by himself. Appellant has been at odds with the law for many years and was familiar with case law procedure and his rights.

1. Appellant cited the Jencks case of 1956.

Transcript of Proceedings, December 1, 1958 lines 17 and 18.

2. Appelant makes motion for new trial.

Transcript of Proceedings, December 1, 1958, page 7A, lines 5, 6, 12-21.

3. Appellant serves notice of appeal and files petition for leave to appeal forma pauperis.

Transcript of Proceedings, December 1, 1958, pages 12 and 13,

4. Appellant elects not to serve sentence.

Transcript of Proceedings, December 1, 1958, page 13, lines 2 and 3.

5. Appellant makes motion for dismissal.

Transcript of Proceedings, December 9, 1958, page 41, lines 16-25, page 42, lines 1-16.

Appellant has argued that he was not advised by the Court that he could testify in his own behalf. A look at Appellant's prior convictions indicates the true reason Appellant did not take the stand in his own behalf.

Transcript of Proceedings, December 1, 1958, pages 9, 10, 11.

The Court did not err in denying Appelant's motion for a new trial. There is no showing by Appellant of an abuse of discretion by the presiding judge.

CONCLUSION.

Appellee contends that the Government's evidence was sufficient to allow the jury to return a verdict of guilty. The Appellant did not introduce any evidence except by cross-examination. Appellant, who has a long prior record of convictions, intelligently waived his right to assistance by counsel offered by the Court. Appellant received a speedy, fair and impartial trial which he was guaranteed by the 6th Amendment of the United States Constitution. The judgment of conviction should be affirmed.

Respectfully submitted,

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